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<DESCRIPTION> Comments on Cable Modem Proposed Rulemaking

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I. Introduction.

A. These comments are submitted in support of those filed by the Alliance of Local Organizations Against Preemption (ALOAP), and as a supplement to them.

B. Comments will respond to 97-99, and 101-104 of the Notice of Proposed Rulemaking. (We are not submitting comments on Section 100 as to open access requirements.)

II. MACC and its members.

The Metropolitan Area Communications Commission (MACC) was formed in 1980 under a state statute allowing Oregon local governments to work together in a cooperative manner by entering into intergovernmental agreements. As an intergovernmental commission, MACC negotiates, administers, and regulates cable franchises on behalf of its members: Washington County and the Oregon cities of Banks, Beaverton, Cornelius, Durham, Forest Grove, Gaston, Hillsboro, King City, Lake Oswego, North Plains, Rivergrove, Tigard, and Tualatin.

MACC also administers and regulates the cable franchise for the City of Milwaukie, Oregon.

A. MACC administers three separate franchises, all served by AT&T Broadband, or its affiliates. There are over 125,000 subscribers covered by the Tualatin Valley, Washington County, and City of Milwaukie Franchises.

B. We are being immediately affected by AT&T's decision of March 29 to stop collection and payment of franchise fees on cable modem service in the following ways:

1. Contrary to requirements of the franchises, there was no prior notice - the effective date was the same as the notice date.

2. Oregon Local Budget Law requires all cities and counties to use a fiscal year budget that starts July 1 and ends June 30. The timing of AT&T's notice came too late for local governments to plan for this change in their next budget.

3. We received over \$320,000 for calendar year 2001 for the three AT&T Broadband (or affiliate) franchises, covering 15 jurisdictions. This amount was

expected to double, or even triple, as the cable systems serving our franchise areas were upgraded.

4. Cost in staff time and legal fees to address this issue is significant. We continue to respond to subscriber complaints (see below, VI. A.) and supporting litigation in addition to our own legal fees incurred in dealing with the operator and advising our Commission (est. cost \$5,000).

### III. Comments concerning 97: Regulatory uncertainty, matters of local concern

A. The starting point for the inquiry should be whether there is a problem requiring national preemption

B. The FCC states its interest is in assuring deployment consistent with its national broadband policy. In fact, there is not one case in Oregon where services could not be delivered or deployment was delayed due to state or local regulation. There are also no cases where services could not be delivered or deployment was delayed due to franchise fees on cable modem services.

C. There is no regulatory uncertainty at the state or local level. The FCC's declaratory ruling created the uncertainty. The industry's response was swift and calculated. Nearly identical letters went out on March 29, 2002, from multiple large operators (AT&T in our area). The FCC should act quickly to bring this matter to a conclusion.

D. Governments in Oregon have cooperated to provide consistent and efficient regulation. MACC is one example. Also, Mt. Hood Cable Regulatory Commission (MHCRC), Metropolitan Policy Committee (the cities of Eugene and Springfield, and Lane County), Mid-Willamette Valley Cable Regulatory Commission (city of Salem and Marion County), as examples. There is no need for federal intervention.

E. MACC has been responsible for collection of franchise fees and assisting subscribers with complaints for the cable modem services provided by our cable operator, and would expect to continue this in the future, if our authority is preserved.

### IV. Comments concerning 98-99: Should state and local regulation of cable modem services be precluded?

A. We support the comments of ALOAP.

B. In addition, legislative history of the Telecommunications Act of 1996 makes it clear that Congress did not intend the FCC to act. It recognized federal, state, and local roles, and specifically preserved them.

1. Section 601 (as discussed by ALOAP).

2. Section 303 (amendments to 47 USC Section 541(b), as to cable operator providing telecommunications service.

3. 47 USC Section 253, as to local right of way authority specifically preserved.

C. It would be impossible to design a federal preemption formula that would fit all 50 states - nor should the FCC attempt to do so based on Congress' clear intent to the contrary.

1. The types of laws potentially affected under this paragraph of the NPRM are those that should remain inviolate.

2. Municipal authority is derived in most cases, and certainly in Oregon, from the state constitution, voter enacted and amended only by the same authority. Federal preemption of such state constitutional provisions is not well founded in the law and is bad policy.

3. A secondary source of municipal authority is a municipal charter, also adopted by vote of the citizens of each municipality or county, and often called a "home rule" charter. Charters also can only be amended by a vote of the people. Such Charters are protected by the state constitution. Federal preemption of such local government charters is not well founded in the law and is also bad policy.

4. Counties without home rule charters derive additional authority from state laws and initiative measures voted upon by their citizens. In the case of Cities with Charters, state law can also operate as an outer boundary for the exercise of authority. For example, in Oregon, cities and counties are already limited by state law to collection of a franchise fee in a certain amount, depending on the utility in question.

V. Comments on 101-102: How does the FCC's classification of cable modem services as an information service affect right of way management by state and local governments?

A. The FCC's tentative conclusion that the cable operator should be allowed to use "previously franchised systems" to provide cable modem service, with no additional franchise requirement, is flawed.

1. As noted in the comments of ALOAP, additional facilities ARE required in the rights of way in order to provide this service.

2. These additional facilities have to be placed in the rights of way in order to provide the cable modem services; equipment at the subscriber premise and operator's headend are not sufficient. These facilities take up additional space in the rights of way. Cable operators are using larger pedestals to add this special equipment to the already located in the rights of way for video purposes.

3. These services, and the additional facilities they require, result in greater and more frequent use of the rights of way. Cable operators spend additional time working in the rights of way for the initial installation of the equipment, and then more work in the rights of way whenever they connect or disconnect a subscriber to the cable modem service.

4. If permits or other authorization for the additional facilities in the rights of way are not required, there will be no ability to track their location so as to coordinate future right of way work and prevent damage and interference.

5. Local governments hold the rights of way and utility easements in trust for the benefit of the public. In addition, substantial public funds are used for the acquisition, construction, and maintenance of these properties. As such, there is a fiduciary duty to manage them responsibly. By allowing their destruction and invasion, without corresponding information requirements,

results in the inability to effectively manage this valuable asset (compensation aside).

B. Title VI of the Telecommunications Act should not be effectively expanded to eliminate all clearly articulated preservation of other state and local authority.

1. The FCC tentatively concludes at 102 that "Title VI does not provide a basis for a local franchising authority to impose an additional franchise on a cable operator that provides cable modem service."

2. This overly broad statement ignores the separate preservation of authority for state and local governments within the Act, such as in Section 601, and Section 621(b) - codified at 47 USC Section 541(b). Cable modem service, if not a cable service, may not be regulated under Title VI. But to take the next step and state that as a result there is NO regulation applicable goes too far based on Congress' intent.

VI. Comments on 103-104: What state and local franchise regulations and fees apply to information services? Are such fees, if not authorized under Title VI, authorized elsewhere?

A. Regulations, including customer service. The classification of cable modem service as an information service has left LFA's with no applicable customer service regulations. All requirements for universal service, guaranteed response to requests for service, responsiveness to outages and requests for service, are gone. And yet, as noted in the comments filed by ALOAP, subscriber complaints are still coming to LFA's for response. If this service is to remain in the regulatory void, who will look out for customers? The FCC must take into account customers needs as it goes forward. Deployment to vast numbers of customers does not assure interoperability or even the ability of citizens to have meaningful access to the national broadband network. The commitment to roll out the service must be accompanied by customer service requirements.

For example, in the past 6 months, MACC staff helped resolve over 45 subscribers' complaints about cable modem services. Nearly all had already contacted the cable operator, on numerous occasions, without satisfactory resolution. The complaints concerned problems related to the change from @Home to ATTBI, inability to obtain service or repair, and chronic billing errors. If authority to regulate this service is not given to local regulators, with appropriate compensation, what entity at the federal or state level will be taking and resolving such complaints?

B. Fees are authorized by state constitution, and local charter under home rule authority, subject to any applicable state law limitations. The FCC should declare its intention to leave such state and local regulations in place.

C. The classification in the declaratory ruling is creating delay and cost for LFA's and customers. While the industry has uniformly determined it will stop collecting and paying franchise fees on these services, there is no uniform response on the regulatory side. For example, franchise renewals are being delayed; additional legal costs are being incurred. Franchise provisions requiring connectivity between systems are not implemented due to this delay, resulting in less access by customers to the national broadband network and needed emergency communications information such as EAS.

D. The Commission needs to act quickly to limit and clarify its role.